In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1609

AMERICAN ALOE CORPORATION,

Petitioner,

vs.

ALOE CREME LABORATORIES, INC.,

Respondent.

BRIEF IN OPPOSITION TO CROSS PETITION FOR WRIT OF CERTIORARI

Respondent prays that the cross petition for writ of certiorari be denied.

QUESTION PRESENTED

The three questions listed by petitioner are based upon the fallacy that hypothetical matters which might be raised (but which have been categorically disproven in the record and held to be so by the trial and reviewing courts) can

serve as issues to be reviewed by this Court. There is in fact only one question presented by the record in this case:

Whether both courts below were correct in finding no support for petitioner's claims for antitrust relief arising from disconnected and unproven charges of unfair competition.

STATEMENT OF THE CASE

Petitioner's statement should be supplemented by the following statement of facts regarding petitioner's claims of unfair competition.

Both courts below found that respondent, Aloe Creme Laboratories, Inc., developed a process for stabilizing and preserving the gel of the aloe vera plant, and thereby pioneered cosmetic uses for the gel. Both courts found that respondent registered and used a series of trademarks, all of which contained the word ALO-.

The district court found that respondent had established secondary meaning for ALO- as applied to its cosmetic line. The Court of Appeals for the Seventh Circuit disagreed, holding the single ALO- trademark to be "denominative" and without trademark protection. The district court found that respondent had not made improper claims to trademark protection for ALO-. The Court of Appeals disagreed and remanded the case for a "redetermination" of the question of whether respondent's claim to a trademark in ALO- constitutes unfair competition.

The Court of Appeals also reversed the district court's finding that respondent did not utilize contracts with its aloe growers in restraint of trade. The Court of Appeals directed the district court to consider whether the "cos-

metic industry'' or the ''market for aloe vera leaves'' constitute the relevant market for further antitrust considerations.

Both courts agreed that respondent did not utilize its contracts with drugstore managers to violate the antitrust laws or the Robinson-Patman Act. The drugstore franchise agreements executed by respondent require the stores to have at least three other cosmetic franchise lines before the agreements are offered. (R. 124-25, 1466.) The agreements are cancellable by either party on 30 days notice. (R. 120.) Furthermore, approximately 60 of the drugstores signing respondent's franchise agreements also sell petitioner's products. (R. 1462, 1463, 1465, 1467.)

While witnesses testified that respondent once claimed to control 80 to 85% of the aloe supply, there was no proof that respondent controlled this percentage of the aloe market. In fact, petitioner's own officers testified that it had always had an adequate supply of aloe vera plants. (R. 1930, 1977, 2179, 2296.) At trial, on appeal, and again in its cross petition here, petitioner has complained that respondent disparaged aloe products of competitors. The record shows that the aloe market was plagued with problems of contamination, and that respondent's letters were intended to protect that market. (R. 226-27.)

REASONS FOR DENYING THE WRIT

1. The record amply supports the decision of both courts below to deny petitioner's hypothetical antitrust claims directed toward disparagement and drugstore franchise agreements.

2. There is no conflict among the circuits and no holding of the courts below at variance with any decision of this Court.

I.

THE ISSUES SUBMITTED BY PETITIONER ARE HYPOTHETICAL OR CONTRADICTED BY EVIDENCE IN THE RECORD.

The questions presented by petitioner ignore the record in this case, and instead are framed as hypothetical statements of issues which might be presented in a proper case. Even a cursory review of the record demonstrates that this is not such a case.

Petitioner's questions all relate to allegations of unfair competition which petitioner hopes to elevate to antitrust claims. While it is true that decisions indicate that antitrust claims *might* be founded on proper allegations, properly proven in a given case, there are no circumstances in this record to support the issues framed by petitioner.

The disjointed charges of anti-competitive conduct commence with the allegation that respondent used drugstore franchise agreements for full-line enforcement of its product sales. Both courts below found, and the record shows, that drugstore managers were not required to sign the agreements, the agreements expressly required the presence of three other cosmetic lines, and most drugstores carried both petitioner's and respondent's cosmetic lines.

The sole citation in support of petitioner's claim that the drugstore agreements violated the Robinson-Patman Act is *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F. Supp. 393 (Idaho, 1964), *aff'd*, 351 F. 2d 851 (9th Cir. 1965), where a state official was found to be guilty of taking bribes from the defendant corporation, which was in turn granted a first position in competitive bidding. The state official receiving the bribe "obstructed and impeded the testing of products of other possible suppliers, including plaintiff, and action on favorable reports on such tests." (235 F. Supp. at 295.) Such authority is hardly applicable to the drugstore contracts here.

Petitioner's claims of disparagement and inflated statements as to respondent's share of the market hardly merit attention. The record discloses that respondent's letters to officials and competitors were part of an attempt to insure that the aloe market remain free of contaminated products. Respondent's claims of contamination were in fact valid. Certain of its competitors had received customer complaints and had been returned products which were in fact contaminated. (R. 226-27.)

Representations as to market share can hardly support an antitrust claim. The issue is the extent of respondent's control of the relevant market in fact, not what persons claimed this control to be. The case has been remanded for consideration of the only relevant antitrust issue, *i.e.*, the nature of the relevant market and respondent's actual share of that market.

To the extent that respondent can be said to have misrepresented the status of its trademarks, this issue likewise has been remanded to the district court for "redetermination" in light of the Court of Appeals' opinion that petitioner was not guilty of unfair competition. Based

upon the record as it exists, and subject to review by the district court, there is no evidence for any claim of antitrust violations other than those which the district court has been directed by the Court of Appeals to consider.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS AND NO HOLDING AT VARIANCE WITH ANY DECISION OF THIS COURT.

Petitioner reads the decision of the Court of Appeals too broadly. The court did not hold that it would never recognize an antitrust claim based upon fraudulent enforcement of trademarks, but only that such claim could not be sustained under the facts of this case. The authorities cited by petitioner are not in conflict with the decision of the Seventh Circuit, but only stand for the proposition that claims based upon fraudulent patent procurement or bad-faith trademark enforcement *may* constitute legal claims in particular circumstances.

Both cases relied upon by petitioner, *Walker Process Equipment* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) and *Kellogg Co.* v. *National Biscuit Co.*, 71 F. 2d 662 (2d Cir. 1934), were decided on the pleadings and merely reinstated complaints against fraudulent acts. Both cases recognized the possibility of antitrust claims, but only if certain facts could be proven. Here, we have a full trial record, and petitioner has fallen far short of proving any facts in support of its disconnected antitrust claims. The opinion of the Seventh Circuit is therefore entirely correct and amply supported by the record.

This Court in *Walker Process* merely held that the fraudulent procurement of a patent may be utilized as a part of a monopolization scheme. That decision relied

heavily upon *Precision Instrument Manufacturing Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, 816 (1945), where this Court emphasized that a patent is an express exception to the general rule against monopolies. Necessarily, fraudulent procurement of a patent and its misuse may have a bearing on a monopolization claim. This Court stressed in *Walker Process* that all other elements necessary to establish monopolization also must be proven. A trademark is not an express exception to the rule prohibiting monopolies. Nothing in the *Kellogg* case is in any way inconsistent with the *Walker* rationale or the decision of the Seventh Circuit here.

The questions posed by petitioner are hypothetical only. Unlike *Walker* and *Kellogg*, the Seventh Circuit had a full record here upon which to base its holding. This Court should not disturb that holding.

Conclusion

Respondent respectfully prays that the cross petition for writ of certiorari be denied.

Respectfully submitted,

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June 19, 1970